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Supreme Court, U.S.
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In the

Supreme Court of the United States

TIMOTHY KYLES,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the constitutional right of a criminal defendant to testify on his or her own behalf is a fundamental right subject to a knowing and voluntary waiver, or merely an "important" right, which may be waived absent actual knowledge of the right.

2. Whether the "demand rule," which presumes wavier of the right to testify absent an on the record demand by a defendant, produces a constitutionally valid waiver of the right to testify where a defendant alleges ignorance of that right.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY KYLES, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To the Appellate Court of Illinois, First District

The Petitioner, Timothy Kyles, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, entered in the above-entitled proceedings on May 14, 2004.

OPINION BELOW

The decision of the Appellate Court of Illinois in *People v. Kyles*, No. 1-01-4263, is contained in an unpublished order pursuant to Illinois Supreme Court Rule 23. The appellate court's May 14, 2004 order is reproduced and attached to this petition. (App. 1-6). The appellate court's August 17, 2004 order denying the Petition for Rehearing is reproduced and attached to this petition. (App. 7). Petitioner sought leave to appeal from the Illinois Supreme Court, which was denied in an order issued on November

24, 2004. The Illinois Supreme Court's order denying leave to appeal is reproduced and attached to this petition. (App. 8).

JURISDICTION

Petitioner seeks review of the May 14, 2004 judgment of the Appellate Court of Illinois, First District, affirming the trial court's dismissal of his post-conviction petition. (See App. 1-6). Petitioner filed a timely Petition for Rehearing, which was denied on August 17, 2004. (App. 7). Petitioner sought leave to appeal from the Illinois Supreme Court, which request was denied on November 24, 2004. (App. 8). This petition is being filed within 90 days of the denial of leave to appeal by the Illinois Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district will have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. AMEND. VI.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV, § 1.

STATEMENT OF THE CASE

Following a jury trial, Petitioner, Timothy Kyles, was convicted of aggravated vehicular hijacking. (TC 181).[1] The State's theory of the case at Petitioner's trial was that Petitioner randomly approached the victim at the victim's residence, and under the guise of a lost motorist seeking directions, Petitioner hijacked the victim's motorcycle by threatening him with a shotgun. The victim, Timothy Kovats, testified accordingly, and he also testified that he had never seen Petitioner prior to the incident. (TR 188). The State called Petitioner's accomplice, Stacy Bland, whose testimony corroborated the victim's version of events. However, Mr. Bland acknowledged on cross-examination that, in his original statement to the police, he stated that Petitioner stopped to talk to the victim about money he owed to Petitioner. (TR 290). Petitioner did not testify at his trial.

The jury found Petitioner guilty, and he was sentenced to an extended term of 55 years in the penitentiary. (TC 181). The appellate court affirmed Petitioner's conviction on April 7, 1998. (SC 64). Petitioner filed his *pro se* petition for post-conviction relief pursuant to the Illinois Post-Conviction Hearing Act[2] on September 30, 1998. (SC 28-34). In March of 1999, the Cook County Public

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[1] Citations to the record below are made as follows: TC, trial common law record; TR, trial report of proceedings; C, post-conviction common law record; R, post-conviction report of proceedings; SC, supplemental post-conviction common law record.

[2] 725 ILL. COMP. STAT. 5/122 (West 1998). The Act provides for review of claims that the proceedings leading to a conviction resulted in a substantial denial of a right "under the Constitution of the United States or of the State of Illinois." *Id.* at 5/122-1(a).

Defender's Office was appointed to represent Petitioner in his post-conviction proceeding.[3] (SC 44).

In March of 2001, Petitioner filed his Amended Supplemental Petition for Post-Conviction Relief (hereinafter "post-conviction petition") alleging, *inter alia*, that he was denied his constitutional right to testify in his own defense. (SC 44-56). In support of his post-conviction petition, Petitioner filed an affidavit in which he stated that: His trial attorney informed him that he would not testify because it would hurt his appeal; his attorney told him he could not testify because of his criminal background; his attorney led him to believe that whether he would testify was the attorney's decision; and his attorney never informed him that he had the right to testify. (SC 57). Petitioner's supporting affidavit further stated that if he had known and understood that it was his decision, then he would have testified at his trial. (SC 58). Finally, Petitioner's affidavit stated:

> If I had testified at my own trial, I would have given evidence that contradicted the State's two eye-witnesses' testimonies. I would have testified that I knew the complaining witness Timothy Kovats and that he owed my [*sic*] money and that he willingly gave me his motorbike to use until he payed me the money he owed me.

(SC 58). Nothing in the record rebuts Petitioner's claim that he was ignorant of his constitutional right to testify.

The State moved to dismiss Petitioner's post-conviction petition. (C 49-56). On December 5, 2001, the trial court

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[3] Under the Illinois Post-Conviction Hearing Act, an indigent petitioner is entitled to court-appointed counsel where the *pro se* petition sufficiently alleges a constitutional violation. *See People v. Coleman*, 701 N.E.2d 1063, 1071 n.2 (Ill. 1998).

held a hearing on the State's motion and dismissed Petitioner's post-conviction petition without holding an evidentiary hearing.[4] (R E-1-14). Petitioner appealed the trial court's dismissal of his post-conviction petition. (C 84).

On May 14, 2004, the Appellate Court of Illinois, First District, affirmed the trial court's dismissal of Petitioner's claim that he was denied his constitutional right to testify at his trial. *People v. Kyles*, No. 1-01-4263, reproduced at App. 1-6 (unpublished order). The appellate court first noted that "the trial court is not required to advise defendant of his right to testify, to inquire whether he knowingly or intelligently waived that right, or to set of record defendant's decision on this matter." (App. 4). In disposing of Petitioner's claim, the appellate court held:

> Although defendant averred that he had expressed his desire to testify to counsel several times, nothing in the record demonstrates that he later reaffirmed that intention when it was time for him to testify by informing the trial court or his attorney that he wished to do so despite advice to the contrary. This silence is perceived as acquiescence with counsel's trial strategy and a waiver of his right to testify.

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[4] The trial court below dismissed Petitioner's claim based on its conclusion that Petitioner's affidavit did not sufficiently allege that his trial attorney prevented him from testifying. (App. 3). The appellate court was free to affirm the dismissal of the petition on any grounds supported by the record. *People v. Thomas*, 647 N.E.2d 983, 988 (Ill. 1995). However, the appellate court below was unable to affirm based on the record, and it disposed of Petitioner's claim solely on the constitutional ruling that is the subject of this Petition for Certiorari. (App. 4-5).

(App. 5) (citations omitted). Petitioner filed a timely petition for rehearing, which was denied on August 17, 2004. (App. 7). Petitioner sought leave to appeal from the Illinois Supreme Court, and his request was denied in an order issued on November 24, 2004. (App. 8). Petitioner now seeks review of the Appellate Court of Illinois' decision that his failure to demand the right to testify on the record resulted in a valid waiver of that right, even though Petitioner contends that he was unaware of his constitutional right to testify at trial.

REASONS FOR GRANTING THE PETITION

It has long been recognized that a criminal defendant cannot validly waive a fundamental, constitutional right unless that defendant has actual knowledge of the right to be waived. *Johnson v. Zerbst*, 304 U.S. 458 (1938). However, the decision below reflects the widespread confusion among state and federal courts as to the precise nature of a criminal defendant's right to testify in his or her own defense since the Court first identified the Constitutional bases of that right in *Rock v. Arkansas*, 483 U.S. 44 (1987). In noting that "the most important witness for the defense in many criminal cases is the defendant himself," 483 U.S. at 52, the Court found the right of a criminal defendant to testify rooted in the Fifth, Sixth, and Fourteenth Amendments. *Id.* at 51-53.

While nearly every federal and state court recognizes that the right of a criminal defendant to testify is constitutional in nature, an alarming number of jurisdictions (both state and federal) have concluded that a criminal defendant may validly waive the constitutional right to testify without knowing that the right exists. Although many courts refuse to presume a valid waiver of the right to testify absent a record from which it may be concluded that the defendant had actual knowledge of the right, others hold that, where a criminal defendant fails to make the desire to testify a matter of record, the right is deemed validly waived. This so-called "demand rule"[5] fails to account for those instances where a defendant alleges (as did Petitioner) ignorance of the right to testify and is based on judicial confusion as to the constitutional nature of this right.

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[5] *See generally Boyd v. United States*, 586 A.2d 670, 676 (D.C.App. 1991) (discussing the "demand rule" and alternative judicial treatment of the right to testify).

The decision below, that a criminal defendant waives the right to testify by failing to demand it on the record despite that defendant's alleged (and unrebutted) ignorance of that right, represents the view of those jurisdictions that have concluded that the right to testify, while constitutional in nature, is "important," but not fundamental. *See, e.g., Torres-Arboledo v. State*, 524 So.2d 403, 410 (Fla. 1988) ("'the right to testify is not so fundamental and personal that it can only be waived by the defendant'") (quoting *Cutter v. State*, 460 So.2d 538, 539 (Fla. 2d DCA 1984)). This view sharply conflicts with that of those jurisdictions wherein the right to testify is considered fundamental and absolute. *See, e.g., People v. Blehm*, 983 P.2d 779, 786 (Colo. 1999) ("the right to testify is sufficiently fundamental to share the procedural safeguards concerning waiver previously reserved for the right to counsel") (citing *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984)). The judicial designation of the right to testify as either "important" or "fundamental" has resulted in sharply conflicting views of the propriety of the demand rule by state courts of last resort. Only in those jurisdictions where the right to testify is categorized as merely important can the demand rule be upheld. This undeniable conflict also extends to our federal circuit courts of appeal. As discussed below, of the six federal circuit courts to directly address the demand rule, the Second, Fifth, and District of Columbia Circuits have rejected it and refuse to presume a valid waiver of the right to testify absent something in the record evincing a defendant's actual knowledge of the right, while the Sixth, Eighth, and Ninth Circuits have adopted it and equate a defendant's silence at trial with a knowing waiver of the constitutional right to testify.

The Court should grant certiorari to clarify whether the right of a criminal defendant to testify in his or her own defense is a fundamental right subject to a constitutionally

valid, *knowing* waiver as mandated by *Zerbst*, or merely an important right which may be waived absent actual knowledge of the right. Review of this case would also allow the Court to resolve the recurring conflict among federal and state courts with respect to the demand rule. Finally, the Court should grant certiorari to correct the erroneous application of the demand rule by the court below.

I. The Decision Below Presents the Important Question of Whether the Constitutional Right to Testify Identified in *Rock v. Arkansas* is a Fundamental Right to Which the Waiver Requirement of *Johnson v. Zerbst* Applies.

Long ago the Court stated: "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted). The Court also explained that waiver of a fundamental right is "an intentional relinquishment or abandonment of a *known* right or privilege." *Id.* (emphasis added). Following the Court's identification of the constitutional bases of the right to testify in *Rock v. Arkansas*, 483 U.S. 44 (1987), many jurisdictions concluded that the requirement of a constitutionally valid waiver with respect to that right was a logical consequence.

For example, in *Boyd v. United States*, 586 A.2d 670 (D.C.App. 1991), the District of Columbia Court of Appeals considered whether a criminal defendant may validly waive the right to testify absent actual knowledge of that right. In that case, following the jury's guilty verdict, the defendant made an "outburst" regarding her attorney's refusal to allow her to testify during the trial. 586 A.2d at

671. The defendant's counsel then informed the trial court that, even though the defendant had previously stated that she wanted to testify, counsel told her she should not because she would be impeached with her prior convictions. *Id.* The trial court found that this was a reasonable tactical decision of counsel. *Id.* On appeal, the defendant asserted that she did not validly waiver her right to testify. In response, the state argued that the right to testify is not absolute and may be waived by counsel. *Id.* at 672. The state further argued that the defendant waived her right to testify by not affirmatively asserting it until after the jury had reached its verdict. *Id.* at 673.

Citing *Rock*, the court in *Boyd* noted that "[t]he decision whether to testify can be the single most important factor in a criminal case." 586 A.2d at 673. *Boyd* also noted this Court's admonishment in *Rock* that an accused's right to offer his or her own testimony is even more fundamental than the right of self-representation. *Id.* at 674. In rejecting the state's contention that the right to testify may be validly waived by counsel, *Boyd* held: "the defendant's right to testify in a criminal trial is a fundamental and personal right which can only be waived by the defendant." *Id.* The court then addressed the issue of whether the defendant validly waived her right to testify absent knowledge of the right. Acknowledging the requirement of a knowing and voluntary waiver attaching to fundamental rights, the court in *Boyd* concluded that "the defendant's right to testify is one of those constitutional rights in which the *Johnson v. Zerbst* standard must apply in determining whether the defendant has waived that right." 586 A.2d at 677.

The court in *Boyd* also considered the adequacy of the demand rule in protecting the fundamental right to testify. The court first explained: "The demand rule is justified in two different ways. Either the right to testify is not viewed

by [the courts employing it] as fundamental . . . or they presume that a defendant, 'educated by television and past courtroom experience' has knowledge of the right to testify." *Boyd*, 586 A.2d at 676 (citations omitted). In holding that the rule does not sufficiently protect the right to testify, the court explained:

> We conclude further that the 'demand rule' advocated by the government is fatally flawed. The demand rule ignores basic realities faced by the defendant and the courts. Many defendants are unaware that they have a constitutional right to testify which no one, not even their lawyer, may take away from them. In addition, the demand rule "requires the defendant to ignore the admonishments of counsel, interrupt the trial proceedings, and interject [herself], uninvited, into the fray." Such a rule ignores the courtroom reality that "defendants who speak out of turn at their own trials are quickly reprimanded, and sometimes banned from the courtroom by the court," as was Boyd. To the extent a defendant may have been "educated by television" to realize that he or she has such a right, as one opinion, on which the government relies,[6] suggested, the defendant still

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[6] The government in *Boyd* relied on the Ninth Circuit's opinion in *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991), wherein the court reasoned that defendant "[e]ducated by television and past courtroom experience of his own . . . had seen criminal defendant's take the stand." *Id.* at 761. The notion that criminal defendants are sufficiently apprised of their constitutional rights by watching television is dubious on its face. *See also Chang v. United States*, 250 F.3d 79, 84 (2d Cir. 2001) (discussing same). In some cases, however, the record may demonstrate that past

(continued...)

> may not know that an objection must be made during trial or that right is forever lost. Further, in *Johnson v. Zerbst*, the Court was unwilling to "presume acquiescence in the loss of fundamental rights." In sum, the demand rule requires a defendant to assert a right of which the defendant may not be aware by objecting in a manner the defendant has been told is inappropriate. We decline to adopt a rule which places such burdens on the defendant.

586 A.2d at 677 (citations omitted). Ultimately, *Boyd* remanded the case for an evidentiary hearing to determine whether the defendant's waiver of the right to testify was knowing and voluntary. *Id.* at 678.

Boyd's rejection of the demand rule is based on the categorization of the right to testify as fundamental and is fully supported by sound constitutional jurisprudence. Many state courts of last resort also categorize the right to testify as fundamental and have rejected the demand rule. *See, e.g., Tachibana v. State*, 900 P.2d 1293, 1300 (Haw. 1995) ("[T]he State urges us to adopt the demand rule. We decline to do so."). In fact, some consider the right to testify so fundamental that they require the trial court to obtain an on the record waiver where the defendant does

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[6] (...continued)
courtroom experience did, in fact, educate the defendant of his or her right to testify, especially where the defendant had testified in a previous criminal trial. *See, e.g., United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) (concluding that the fact that the defendant testified in his first trial, which resulted in a hung jury, provided a sufficient basis for inferring that defendant knew he had the right to testify in his subsequent trial). However, the rational of *Martinez* ignores those situations, such as the instant case, where the defendant's prior convictions were entered pursuant to plea as opposed to a jury verdict.

not testify. *See, e.g., State v. Neuman*, 371 S.E.2d 77, 81 (W.Va. 1988) ("the decision to testify in one's own behalf . . . is so fundamental that procedural safeguards must be employed on the record to insure that the defendant's waiver of the right to testify was made voluntarily, knowingly, and intelligently."); *People v. Blehm*, 983 P.2d 779, 786 (Colo. 1999) ("We also recognize[] that the right to testify is sufficiently fundamental to share the procedural safeguards concerning waiver previously reserved for the right to counsel.").[7]

In contrast, those state courts employing the demand rule have, without justification, categorized the right to testify as important, but not fundamental. For example, in *Torres-Arboledo v. State*, 524 So.2d 403 (Fla. 1988), the Supreme Court of Florida endorsed the Florida appellate court's ruling in *Cutter v. State*, 460 So.2d 538, 539 (Fla.

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[7] The "colloquy" approach, *see Tachibana*, 900 P.2d at 1300, whereby the trial judge is required to question the defendant in order to ascertain the defendant's understanding of the right to testify whenever the defendant does not testify, has been rejected by some states based on the possibility of the defendant being influenced by the court to testify or decline to do so. *See, e.g., Aragon v. State*, 760 P.2d 1174, 1179 (Idaho 1988). In addition, the colloquy approach has been largely rejected by the federal circuit courts of appeal. *See United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991) ("The United States Supreme Court has not decided whether there is an affirmative duty of a trial court to advise the defendant of [the right to testify]. However, the majority of the federal circuit courts agree that there is no such duty."). While uniform application of the colloquy approach would virtually eliminate the recurring post-conviction litigation involving the right to testify throughout the United States, the constitutional standard enunciated in *Johnson v. Zerbst* may be satisfied without judicial involvement so long as the record demonstrates that a non-testifying defendant had actual knowledge of the right.

2d DCA 1984), which concluded that absent "express disapproval on the record" by the defendant, the defendant's attorney may waive the defendant's right to testify. *Torres-Arboledo*, 524 So.2d at 410. In adopting the demand rule, the court reasoned: "Although we agree that there is a constitutional right to testify, under the due process clause of the United States Constitution . . . this right does not fall within the category of fundamental rights which must be waived on the record by the defendant." 524 So.2d at 411. *Torres-Arboledo* did not address this Court's decision in *Rock*, nor did it acknowledge that the right to testify is also guaranteed by the Fifth and Sixth Amendments. *See Rock*, 483 U.S. at 52-53.

The court in *Torres-Arboledo* relied on the Supreme Court of Wisconsin's ruling in *State v. Albright*, 291 N.W.2d 487 (Wis. 1980). *See* 524 So.2d at 410-11. Although *Albright* was decided prior to the Court's ruling in *Rock*, the Wisconsin court had already determined that the right to testify is constitutional in nature. *See Albright*, 291 N.W.2d at 490 ("We need not decide whether the Wisconsin Constitution grants a constitutional right to testify, because we conclude that the United States Constitution guarantees that right."). Nonetheless, the court concluded that the right to testify could be waived by counsel absent a demand to testify by the defendant. *Id.* at 492. As the court in *Albright* explained:

> We recognize that certain constitutional rights of a criminal defendant are so fundamental that they are deemed to be personal rights which must be waived by the defendant. In this category of personal rights is found the decision whether to plead guilty, the decision whether to request a trial by jury, the decision to appeal, the decision whether to forego the assistance of counsel, and the decision to obtain the assistance of counsel and to

> refrain from self-incrimination. We are not convinced that the right to testify falls within this category of "fundamental" rights, which can only be waived by the defendant. To be sure, the right to testify is an important constitutional right. However, we believe that the right to testify, as distinguished from those rights considered to be so fundamental as to be personal to the defendant, does not go to the very heart of the adjudicatory process.

291 N.W.2d at 490-91 (citations omitted). Thus, as *Torres-Arboledo* and *Albright* make clear, the demand rule is grounded in judicial doubt that the right to testify is, in fact, a fundamental right. That doubt is evident in the ruling of the court below.

The continued existence of the demand rule in certain federal circuits, however, is not so easily explained. For example, in *United States v. Webber*, 208 F.3d 545, 550 (6th Cir. 2000), the Sixth Circuit stated that "[t]he right of a defendant to testify at trial is a constitutional right of fundamental dimension and is subject only to a knowing and voluntary waiver by the defendant." *Id.* at 550 (citing *Rock*, 483 U.S. at 52). Yet, according to that same court, "[w]aiver is presumed from the defendant's failure to testify or notify the trial court of the desire to do so." *Id.* at 551. Insight into this constitutional inconsistency may be gleaned from the dissenting opinion in *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992), wherein the often quoted language regarding the right to testify in *Rock* was labeled "dicta." 953 F.2d at 1555 (Edmondson J., dissenting). In any event, as discussed below, the question of whether the right to testify is subject to the constitutionally valid waiver requirement appurtenant to all fundamental rights is no closer to resolution in our federal courts of appeal than it is in our state courts of last resort.

The diametrical views of the right to testify as demonstrated by the conflicting application of the demand rule from jurisdiction to jurisdiction, are a result of judicial confusion as to the constitutional nature of the right. Although the Court in *Rock* made clear that the right to testify is constitutionally based, the apparent lack of specificity in that case with respect to the precise nature of the right has resulted in disparate judicial treatment in recurring cases where a defendant claims the right was violated. The Court should grant certiorari to resolve the existing judicial uncertainty as to whether the right to testify is a fundamental, or merely important, constitutional right.

II. The Federal Circuit Courts of Appeal are Divided as to Whether the Demand Rule, Which Presumes Wavier of the Right to Testify Absent an on the Record Demand by a Defendant, Produces a Constitutionally Valid Waiver of the Right to Testify Where a Defendant may be Unaware of that Right.

As noted above, the judicial uncertainty of whether the right to testify is fundamental, or merely important, has resulted in varying treatment of the right from one state to the next. The varying acceptance of the demand rule among our federal circuit courts of appeal reveals that this judicial confusion is not limited to the state courts of last resort. Of the six federal circuit courts to have directly addressed the rule, three have adopted the demand rule and three have rejected it. The Sixth, Eighth, and Ninth Circuits have embraced the demand rule and equate a defendant's silence at trial with a knowing waiver of the constitutional right to testify, while the Second, Fifth, and District of Columbia Circuits have rejected it and refuse to presume a valid waiver of the right to testify absent

something in the record evincing a defendant's actual knowledge of the right. Not surprisingly, those circuits that have rejected the demand rule offer sound reasoning for doing so, while those adopting it fail to provide any adequate justification.

The Ninth Circuit is a leading proponent of the demand rule with respect to the right to testify. In *United States v. Edwards*, 897 F.2d 445 (9th Cir. 1990), the court addressed the question of whether a defendant could have validly waived the right to testify where the defendant alleged ignorance of the right. Following a conviction for rape, the defendant in *Edwards* filed a post-trial motion alleging that his trial attorney refused to allow him to testify on his own behalf. 897 F.2d at 446. At an evidentiary hearing on the motion, the attorney testified that the defendant (an Apache Indian) simply told him "I testify," and due to an apparent communication barrier, the attorney was not aware that the defendant was making a demand to testify. *See id.* (explaining the attorney's dilemma resulting from the defendant's failure to use "any other verbs"). In affirming the defendant's conviction, the court purported to extend its ruling in *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470 (9th Cir. 1991), which held that a trial court is under no duty to advise a defendant of the constitutional right to testify. 897 F.2d at 446. Accordingly, the court in *Edwards* held that, despite the defendant's unrebutted assertion that he was not aware of his constitutional right to testify, the defendant's "silence at trial effectively waived his right to testify." *Id.* at 447.

The Sixth and Eighth Circuits have also adopted the demand rule in response to claims that the right to testify was violated. *See United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000) ("Waiver is presumed from the defendant's failure to testify or notify the trial court of the

desire to do so"); *United States v. Kamerud*, 326 F.3d 1008, 1017 (8th Cir. 2003) (stating that, if an accused wishes to exercise the right to testify, the accused must express the desire to do so at the appropriate time "'or a knowing and voluntary waiver of the right is deemed to have occurred'") (quoting *United States v. Blum*, 65 F.3d 1436, 1444 (8th Cir. 1995)). Neither *Edwards*, *Webber* nor *Kamerud* attempted to reconcile the demand rule with the knowing and voluntary waiver requirement set forth in *Johnson v. Zerbst*.

In contrast, the Second Circuit regards as "'highly questionable the proposition that a defendant's failure to object at trial to counsel's refusal to allow him to take the stand constitutes waiver of the defendant's constitutional right to testify on his own behalf.'" *Chang v. United States*, 250 F.3d 79, 83-84 (2d Cir. 2001) (quoting *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990)). In *Chang*, the court reviewed the trial court's dismissal of the defendant's petition for a writ of habeas corpus in which he alleged that his trial attorney prevented his from testifying. 250 F.2d at 80. The court began its analysis by discussing the demand rule and noting that "[o]ther circuits that have addressed [the demand rule] have not reached uniform results." *Id.* at 83. In rejecting the demand rule, the court in *Chang* explained:

> We . . . agree with those circuits that have refused to find a waiver or forfeiture solely from a defendant's silence at trial. At trial, defendants must generally speak only through counsel, and, absent something in the record suggesting a knowing waiver, silence alone cannot support an inference of such a waiver . . . A defendant who is ignorant of the right to testify has no reason to seek to interrupt the proceedings to assert that right, and we see no reason to impose what would in effect be a penalty on such a defendant.

Id. at 84. Although the court in *Chang* ultimately affirmed the dismissal of the defendant's claim based on the trial attorney's affidavit (submitted in response to the defendant's petition) stating that the attorney fully apprised the defendant of his constitutional right to testify, *id.* at 86, the court made clear that the defendant "did not waive or forfeit his [right to testify] by failing to object at trial." *Id.* at 84.

Joining those circuits rejecting the demand rule, the District of Columbia Circuit recognized "the impracticability of placing a burden on the defendant to assert a right of which he might not be aware or to do so in contravention of the courts instructions that the defendant speak to the court through counsel." *United States v. Ortiz*, 82 F.3d 1066, 1071 (D.C. Cir. 1996). In addition, the Fifth Circuit has rejected the demand rule, noting that "[d]eclining to place upon the defendant the responsibility to address the court directly is consistent with the reality that routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so." *United States v. Mullins*, 315 F.3d 449, 455 (5th Cir. 2002).

As demonstrated by the disparate treatment of the constitutional right to testify among our federal circuit courts of appeal, conflict exists as to whether the right is truly fundamental. The Sixth, Eighth and Ninth Circuits have failed to justify the continued existence of the demand rule in those circuits. The Second, Fifth, and District of Columbia Circuits, on the other hand, have found the demand rule constitutionally inadequate based on a basic synthesis of the principles enunciated in *Rock* and *Zerbst*. Absent much-needed guidance from the Court, an accused's opportunity to testify in his or her own defense may depend on the jurisdiction in which they are accused. Moreover, it is patently unreasonable to assume

that defendants are well-versed in the law on the right to testify when our federal circuit courts of appeal cannot uniformly decide the law with respect to that right. The Court should grant certiorari to resolve this inexplicable conflict in the federal circuits.

III. The Application of the Demand Rule by the Court Below Conflicts with the Court's Decisions in *Rock v. Arkansas* and *Johnson v. Zerbst.*

In the case at bar, the Petitioner was convicted of aggravated vehicular hijacking. This conviction was the result of the state convincing a jury that Petitioner randomly confronted a stranger and hijacked his motorcycle by threatening him with a shotgun. The victim testified that he had never seen Petitioner prior to the incident. The State also called Petitioner's accomplice, who corroborated the victim's testimony. However, the accomplice acknowledged on cross-examination that he originally told the police that Petitioner stopped to talk to victim about money he owed to Petitioner.

Petitioner claims that, if he had know that it was his decision whether to testify, then he would have testified that he, in fact, knew the victim, and the victim owed him money. Further, Petition would have testified that the victim willing relinquished the motorcycle as security for the money owed. If Petitioner would have been allowed to testify, and if the jury would have found that Petitioner obtained the motorcycle through an agreement to satisfy the victim's financial obligation to Petitioner, rather than by threat of violence, then the jury would have to have found Petitioner not guilty. However, Petitioner claims that his attorney led him to believe that it was the attorney's choice as to whether Petitioner would testify and that the attorney would not permit Petitioner to testify.

In affirming the dismissal of Petitioner's claim that he was denied his constitutional right to testify in his own defense, the court below concluded that, despite Petitioner's assertion that he was unaware that his attorney could not properly prevent him from testifying, Petitioner's failure to make his desire to testify a matter of record resulted in waiver of that right. (App. 5). The court below, however, identified nothing in the record to support an inference that Petitioner knew of his constitutional right to testify, and nothing in the record supports such an inference. Moreover, like other jurisdictions that mechanically apply the demand rule to dispose of claims that the right to testify was not knowingly waived, the court below provided no justification for disregarding this constitutional right. (See App. 4-6). For the court below to have concluded that the knowing and voluntary waiver requirement reserved for fundamental rights does not apply to the right to testify, it necessarily must have concluded that the right to testify is not a fundamental right. This conclusion in in error.

As discussed in Part I, those state courts of last resort that follow the demand rule have concluded that the right to testify articulated in *Rock v. Arkansas* is important, but not fundamental. And as set forth in Part II, not one of the federal circuit courts that have adopted the demand rule with respect to the right to testify have reconciled (or attempted to reconcile) the rule with the waiver requirement of *Johnson v. Zerbst*. Any thoughtful consideration of the constitutional principles enunciated in *Rock* and *Zerbst* reveals that they cannot be reconciled with the demand rule.

For example, in *Rock*, the Court explained that the right to testify is guaranteed by, *inter alia*, the Sixth Amendment of the Constitution. 483 U.S. at 52. Those courts that have concluded that the right to testify is not a fundamen-

tal right, then, must also conclude that the right to testify is the only Sixth Amendment right which is not fundamental in nature. *See, e.g., Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) ("We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."); *Gideon v. Wainright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); *Toth v. Quarles*, 350 U.S. 11, 16 (1955) ("[The] right of trial by jury ranks very high in our catalogue of constitutional safeguards."). This conclusion, however, is not supported by any authority of this Court, nor can it be harmonized with this Court's observation in *Rock* that, "[a]t this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." 483 U.S. at 49.

Moreover, the demand rule, "by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncement on waiver of constitutional rights." *Barker v. Wingo*, 407 U.S. 514, 525 (1972). In *Barker*, this Court rejected a "demand-waiver" rule in the context of the Sixth Amendment right to a speedy trial as "insensitive to a right which [it] deemed fundamental." 407 U.S. at 529-30. The demand-waiver rule employed by the lower court in *Barker* purported to waive any consideration of the right to a speedy trial for any period prior to the defendant's demand for a trial. *Id.* at 525. In finding the demand-waiver rule constitutionally invalid, this Court noted that a defendant "'should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand.'" *Id.* at 526 n.5 (citations omitted). As this Court explained: "the better rule is that the defendant's assertion or failure to assert his right to a speedy trial is one of the

factors to be considered in an inquiry into the deprivation of that right." *Id.* at 528. As *Barker* makes clear, the Sixth Amendment right to a speedy trial cannot be subjected to a demand-waiver rule, and the Court's reasoning in that case logically extends to all Sixth Amendment rights, including the right to testify.

Finally, the court below has joined those jurisdictions which have declined to require trial courts to advise defendants on the record of the right to testify. (See App. 4). Yet, the court below requires defendants to make their desire to testify a matter of record or lose it forever, even if the defendant is ignorant of the right to testify. This judicial deck-stacking violates any standard of fundamental fairness and reflects blatant disregard of a constitutional right. If a defendant is to be charged with perfecting the record with respect to his or her desire to testify, then the record must fairly demonstrate actual knowledge of the right to do so.

As the Court stated in *Rock v. Arkansas*: "There is no justification today for a rule that denies an accused the opportunity to offer his own testimony." 483 U.S. at 52. Indeed, in invoking the demand rule, the court below offered no justification for its cavalier treatment of the Petitioner's constitutional right to testify in his own defense. In contrast, those state and federal courts that have rejected the demand rule have based their decision on well-reasoned constitutional principles. The Court should grant certiorari and apply those principles to correct the decision below.

CONCLUSION

For the foregoing reasons, Petitioner, Timothy Kyles, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois.

Respectfully submitted,

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SIXTH DIVISION
MAY 14, 2004

No. 1-01-4263

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 94 CR 20407
TIMOTHY KYLES,	)	Honorable Carol A. Kipperman, Judge Presiding.
Defendant-Appellant.	)	

ORDER

Defendant, Timothy Kyles, appeals from an order of the circuit court granting the State's motion to dismiss his amended supplemental post-conviction petition without an evidentiary hearing. He contends that the court erred in dismissing his petition at this stage of proceedings since he had made a substantial showing that his constitutional right to testify in his own defense was violated when his counsel prevented him from exercising that right at trial. Defendant further contends that his extended-term sentence was imposed in violation of the

ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Following a jury trial, defendant was convicted of aggravated vehicular hijacking and unlawful use of a weapon. Based on his prior criminal history, defendant was sentenced to an extended term of 55 years' imprisonment. We affirmed that judgment on direct appeal in an order which fully sets forth evidence presented at trial. People v. Kyles, No. 1-96-2706 (1998) (unpublished order under Supreme Court Rule 23).

In his pro se post-conviction petition, defendant alleged inter alia, that he was denied his right to effective assistance of trial counsel who refused to allow him to testify in his own behalf, and appellate counsel for failing to raise the issues stated in his petition on direct review.

The circuit court appointed counsel to represent defendant and post-conviction counsel filed an amended supplemental petition arguing the necessity of an evidentiary hearing on defendant's claims. Post-conviction counsel further claimed that defendant's extended-term sentence was imposed in violation of the ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Defendant filed an additional amended pro se petition and submitted an affidavit stating that his trial counsel repeatedly advised him not to testify, and that he thought this decision rested with trial counsel. Defendant also stated that counsel initially told him that he did not think it was a good idea for defendant to testify, and later said that he could not testify because of his criminal background and because it would hurt his appeal. Defendant further stated that he had pleaded guilty before, but never went to trial, that he was not advised by counsel or the court of his constitutional right to testify, and

would have testified if he had understood that whether or not to testify was his decision.

In response, the State argued that defendant failed to whether or not to include defendant's testimony was counsel's decision and urged the court not to engage in such speculation. The State further responded that defendant waived this issue by not voicing his desire to testify during the trial, at the close of trial, or in post-trial proceedings.

At the hearing on the motion to dismiss, post-conviction counsel argued that neither trial counsel nor the trial court properly admonished defendant of his right to testify, and that defendant was thus entitled to an evidentiary hearing. The State responded that there was no record evidence that defendant ever expressed his desire to testify to the court, and that he had thus waived the issue. In addition, the State noted that assert that he was told by trial counsel that the decision of defendant had two prior armed robbery convictions and one prior robbery conviction which counsel would not. want to place before the jury deciding defendant's case and so advised defendant.

Defense counsel maintained that the court could not consider defendant's thought. process here and make a credible determination without live testimony. Counsel argued that the only sure way to establish what defendant was thinking would be to bring in defendant and his attorney. The State pointed out that trial counsel was in the courtroom; however, it was noted that defendant was not.

The trial court was not convinced that defendant had made a proper showing and dismissed defendant's amended supplemental petition without an evidentiary hearing. Defendant now appeals from that ruling.

A defendant is not entitled to an evidentiary hearing on a post-conviction petition as a matter of right. People v. Barrow, 195 Ill. 2d 506, 519 (2001). Rather, an evidentiary hearing is warranted only when the allegations of the post-conviction petition, supported when necessary by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional rights have been violated. Barrow, 195 Ill. 2d at 519. In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and any accompanying affidavits must be taken as true. Barrow, 195 Ill. 2d at 519. Our review of the circuit court's dismissal order is de novo. Coleman, 183 Ill. 2d 366, 389 (1998). In this case, defendant challenges the propriety of the dismissal order entered by the court. He maintains that his petition and supporting affidavit made a substantial showing that his counsel prevented him from exercising his constitutional right to testify in his own defense and that he was entitled to an evidentiary hearing. In his affidavit, defendant stated that prior to trial and at the beginning of trial proceedings, he asked counsel if he could testify and was variously told that his testimony would hurt his appeal in light of his criminal background.

We initially observe that the decision of whether to take the witness stand and testify in one's own behalf ultimately belongs to defendant. People v. Thompkins, 161 Ill. 2d 148, 177 (1998). We further observe that the trial court is not required to advise defendant of his right to testify, to inquire whether he knowingly or intelligently waived that right, or to set of record defendant's decision on this matter. People v. Smith, 176 Ill. 2d 217, 235 (1997). Thus, defendant's allegations in this regard do not further his claim.

More importantly, we find that the allegations in defendant's post-conviction pleadings and affidavit do not substantially show a denial of his constitutional rights

with regard to counsel or his right to testify. Although defendant averred that he had expressed his desire to testify to counsel several times, nothing in the record demonstrates that he later reaffirmed that intention when it was time for him to testify by informing the trial court or his attorney that he wished to do so despite advice to the contrary. People v. Brown, 54 111. 2d 21, 24 (1973); People v. Sanders, 209 Ill. App. 3d 366, 376 (1991). This silence is perceived as acquiescence with counsel's trial strategy and a waiver of his right to testify. Smith, 176 111. 2d at 235-36; Thompkins, 161 111. 2d at 177-78; Sanders, 209 Ill. App. 3d at 376. Accordingly, we find that the circuit court properly denied defendant an evidentiary hearing in this case. Brown, 54 111. 2d at 24; see also People v. Knox, 58 111. App. 3d 761, 767-68 (1978) (no evidentiary hearing was required on this issue).

In reaching that conclusion, we find defendant's reliance on People v. Lester, 261 Ill. App. 3d 1075, 1079 (1994) misplaced. In the appeal filed after an evidentiary hearing on remand, the reviewing court explained that in the prior appeal it did not create a per se rule of ineffective assistance where counsel told his client that his testimony might hurt his appeal. People v. Lester, 291 Ill. App. 3d 66, 70 (1997). Further, the court clarified that such advice could serve to inform defendant of all the potentialities so that he could make an informed decision. Lester, 291 Ill. App. 3d at 70.

Finally, we reject defendant's argument that his extended-term sentence was imposed in violation of the ruling in Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The supreme court has determined that Apprendi does not apply retroactively to criminal cases in which the direct appeal process concluded before Apprendi was decided. People v. De La Paz, 204 Ill. 2d 426, 429 (2003). In this case, defendant's

direct appeal process concluded before Apprendi was decided, thus Apprendi provides no basis for relief.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirm.

TULLY, J., with O'MARA FROSSARD, P.J., and FITZGERALD SMITH, J., concurring.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL. DISTRICT—SIXTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Respondent-Appellee,	)	
v.	)	No. 1-01-4263
TIMOTHY KYLES,	)	
Petitioner-Appellant.	)	

ORDER

This cause coming to be heard on Appellant's Petition for Rehearing, the Court being fully advised in the premises;

IT IS HEREBY ORDERED that the Appellant's Petition for Rehearing is DENIED.

/s/_____
Justice
/s/_____
Justice
/s/_____
Justice

Order Entered August 17, 2004
Appellate Court, First District

99191

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 24, 2004

Mr. Matthew T. Volk
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No. 99191—People State of Illinois, respondent, v. Timothy Kyles, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 16, 2004.